UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Fresno, California)

MEDIA ONE OF FRESNO, INC. and
MEDIA ONE OF SIERRA VALLEYS, INC.[1]
Employer

and Case 32-RD-1402

RONNIE SOTO, an individual
Petitioner

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 9408
Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly being filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that Communications Workers of America, herein called CWA, and Communications Workers of America, Local 9408, herein called Local 9408, are each a labor organization within the meaning of Section 2(5) of the Act.

4. As an initial matter, Local 9408 argues that the petition should be dismissed because it names Communications Workers of America, Local 9408, rather than Communications Workers of America, the national union, which was never served with a copy of the petition. According to Local 9408, CWA, not Local 9408, is the exclusive bargaining representative of the employees involved in this petition. As more fully set forth below, I deny Local 9408's motion to dismiss the petition because the record evidence establishes that Local 9408 is the elected representative of the employees.

5. Local 9408 contends that no question of representation exists because: (1) by virtue of a neutral third party election, a certification bar of one year should be applied; and (2) a reasonable period of time to bargain had not elapsed between the date of Local 9408's certification by the neutral third party and the filing of the petition, thereby establishing a recognition bar. For the reasons set forth below, I find that neither a certification bar or a recognition bar exists and, therefore, I am directing an election in the petitioned-for unit.

FACTS

In July 1999, the Employer's parent company, AT&T Broadband, entered into a Memorandum of Understanding (MOU) with Communications Workers of America (CWA) regarding neutrality and consent elections in the event CWA wanted to organize employees in certain AT&T business operating units and divisions. By letter dated June

[1] The Employer's name appears as amended at the hearing.

19, 2001, CWA Local 9408 gave the Employer notice of its intent, pursuant to the MOU, to conduct a formal organizing drive among the unit employees covered by the instant petition. In accordance with the MOU, on July 18, 2001, the American Arbitration Association conducted a representation election among the unit employees in Fresno and Visalia, California. The results of the election were 96 ballots cast in favor of representation by Communications Workers of America, Local 9408; 42 ballots cast against representation; and 19 challenged ballots which were not determinative of the results. The evidence does not establish that the bargaining unit employees understood that by voting for Local 9408 they were actually voting for CWA to be their Section 9(a) representative.

About one month after the election, the CWA informed the Employer that it was not available to begin negotiations until October 2, 2001, despite the Employer's request that they begin sooner than that. The record does not establish the process by which CWA took the lead role in the bargaining. There is also no evidence regarding the circumstances under which CWA and the Employer ultimately agreed that CWA, rather than Local 9408, was to be recognized as the exclusive bargaining representative of the unit. In particular, there is no claim, or evidence establishing, that CWA demonstrated to the Employer that it had secured majority support within the bargaining unit after Local 9408 had won the arbitrator held election or establishing that CWA otherwise had become the lawful representative of the unit.

Louise Caddell, the Administrative Assistant to CWA's District 7 Vice President, was the chief negotiator for CWA. She was assisted by another national union representative, a Local 9408 representative, and two bargaining unit employees. In the

bargaining, the parties agreed to use a template agreement, which had been drafted by AT&T Broadband, the Employer's parent corporation, and CWA on a national level in April 2001. This template agreement contained contract language covering issues that CWA and AT&T Broadband had faced throughout the country. Following the initial session, the parties continued to meet on a monthly basis, for a total of 27 face-to-face meetings, which typically lasted all day. Of 39 separate contract articles, the text for 35 of them was based on template language.[2]

By October 16, 2001, after only 3 bargaining sessions, the parties had reached agreement on 16 separate articles. The parties bargained about local issues without template language. These included a complete training section; a section on layoffs involving bumping language; wages and promotions. The parties also negotiated complete job descriptions for about 16 bargaining unit classifications, which became appendices to the final contract. This particular contract was not meant to be a model for others around the country; there were already a number of existing contracts with CWA at other AT&T facilities.

By the early part of May 2002, the only remaining issues were wages, a promotion allowance and a boot allowance.[3] The parties met face to face on May 1, 8, 9, 29 and 30 without resolving or making any movement on these issues. On May 30, the Employer presented its final offer to CWA, which CWA rejected. Throughout

[2] Although the parties agreed to use the template language, they were not bound to use it word for word. In some sections, they used the exact language of the template, while in other sections they modified the language to fit the particular needs of the facilities in issue.

[3] The Employer was offering a 3% wage increase, CWA wanted 4%; the Employer offered a $100 boot allowance, CWA wanted $180; and the Employer offered a 5% promotion allowance, the CWA wanted 8%.

negotiations, CWA never alleged that the Employer was bargaining in bad faith, and neither party contended that the parties had reached impasse in the negotiations.

At some point in April or May, officials from the Employer's parent corporation, AT&T Broadband, began parallel discussions with CWA national union officials in an effort to reach agreement on the remaining issues in Fresno/Visalia; to finalize contracts at several other facilities not involved herein; and to resolve issues concerning CWA's opposition to AT&T Broadband's merger with another company, Comcast. These discussions on the national level were successful and resolved all of the disputed issues. As a result, an overall final agreement for the Fresno/Visalia unit was reached on May 31, 2002, the day after the instant petition was filed. Bargaining unit employees ratified the agreement on June 11 and it became effective June 12, 2002.

The ratified collective bargaining agreement in this case is between the Employer and Communications Workers of America, and in Article 2 the Employer recognizes Communications Workers of America as the bargaining representative of the bargaining unit.[4] There are no specific references to Local 9408 in the contract; however, CWA will have Local 9408 officials administer and enforce the contract on a day-to-day basis, including processing grievances at the lower steps of the procedure.

ANALYSIS

Notice Issue

The evidence establishes that the employees had selected Local 9408 as their Section 9(a) representative. The employees voted for Local 9408, and the American Arbitration Association certified Local 9408, as the collective bargaining representative

[4] I note that the CWA's constitution requires that all collective bargaining agreements in the telecommunications industry be with CWA, the national union, rather than with a local union.

of the employees in the unit covered by this petition. There is no evidence or claim that a majority of the unit employees ever designated Communications Workers of America as their collective bargaining representative. Rather, any claim the CWA might have regarding its representative status would be based on the bargaining and the collective bargaining agreement agreed to by the CWA and the Employer. Notice of the filing of the petition and notice of the hearing were properly served on Local 9408, and Local 9408 was represented at the representation hearing by its attorney. Under these circumstances, the failure to include CWA on the petition and the failure to serve CWA with the petition and notice of hearing are not a basis for dismissing the petition.[5] Accordingly, the motion to dismiss in this regard is denied.

Certification Bar Issue

Although the Board has extended its certification year rule to representation elections conducted by state authorities, it has not done so to those conducted by neutral third parties, such as in the instant case. In its brief, Local 9408 relies on *Interboro Chevrolet Co.*, 111 NLRB 783 (1955), as support for expanding the certification year rule to include elections conducted by neutral third parties. Although there is dicta in *Interboro* indicating the Board would be favorably inclined to such an expansion of the rule, in the 47 years since the *Interboro* decision issued, there are no cases where the Board has actually applied the *Interboro* doctrine to elections conducted by neutral third parties. Accordingly, the certification year rule does apply here and does not bar the processing of this petition.

[5] The parties stipulated that Local 9408 is a separate labor organization from CWA. Local 9408's attorney also argued on the record that it is well known that there is a difference between a local union and an international union.

Recognition Bar Issue

Finally, Local 9408 argues that the petition should be dismissed on the basis that a recognition bar exists as found in *Lee Lumber and Building Material Corp.*, 334 NLRB No. 62 (2001) and *MGM Grand Hotel, Inc.*, 329 NLRB 464 (1999). With regard to *Lee Lumber* recognition bar analysis, I note that the Board specifically stated that the standards announced in *Lee Lumber* apply only to situations in which employers have unlawfully refused to recognize or bargain with incumbent unions, and not to cases, such as the instant case, where an employer has voluntarily extended recognition. In *MGM*, on the other hand, the Board was analyzing the recognition bar doctrine in the context of a voluntary recognition.

In *MGM*, the Board analyzed the following factors in deciding whether a recognition bar should apply: (1) whether the parties were bargaining for an initial contract; (2) the complexity of the bargaining process and of the issues being negotiated; (3) amount of time elapsed and number of bargaining sessions; (4) the progress made in negotiations and whether the parties were close to concluding an agreement; and (5) whether the parties were at impasse.

A recognition bar does not exist in this case for the following reasons. First, at its most basic level, a recognition bar applies, for a limited period of time, to the Section 9(a) representative that is bargaining for a collective bargaining agreement . Here, Local 9408, by winning the arbitrator held election became the Section 9(a) representative of the bargaining unit. Although present at the bargaining, it appears that Local 9408 did not engage in bargaining on its own behalf during the negotiations with the Employer; rather CWA bargained with the Employer on its own behalf. In fact, Local

9408 is not even a party to the collective bargaining agreement that was agreed to in that bargaining; although, I note that CWA apparently will be delegating certain day-to-day contract administration authority to Local 9408. As Local 9408 was not bargaining on its own behalf for a collective bargaining agreement with the Employer, the recognition bar does not apply to Local 9408.

With regard to CWA, the evidence does not establish that it had demonstrated majority support in the bargaining unit, or that it otherwise was the Section 9(a) representative of the unit. Therefore, the recognition bar does not apply to CWA, even though it was engaged in bargaining with the Employer. *MGM Grand Hotel, Inc.*, above.

Even if the recognition bar test were somehow applicable to CWA, I find that there would be no recognition bar in this case. In *MGM*, the Board found that a recognition bar existed even though the petition was filed about eleven months after the union in that case was recognized as the bargaining representative of the unit. The Board, however, noted that it was willing to extend a recognition bar for that length of time due to the extremely unusual circumstances in that case. In *MGM*, the parties were bargaining for an initial contract, which was to cover an approximately 3000-employee unit at one of the largest hotels in Las Vegas, Nevada. The parties were trying to establish a unique contract that could be used as a model for other employers in the area. In so doing, the parties created numerous committees and subcommittees and incorporated small group meetings into the negotiation process. The issues were necessarily complex and were expanded to include "living contract" provisions and a commitment to study childcare provisions that had never been included in other area hotel contracts. At the time the decertification petition was filed, the parties had been

bargaining for over 11 months and had made substantial progress with only a few issues remaining unresolved. They reached final agreement only a few days after the petition was filed. Neither party contended that an impasse had been reached. Relying on these novel factors, in particular the uniqueness of the contract and complexity of the bargaining process, the Board found that a reasonable amount of time had not elapsed when the petition was filed and affirmed the Regional Director's decision to dismiss the petition.[6]

Some aspects of this case are similar to the facts in *MGM*. As in *MGM*, the parties were negotiating an initial collective bargaining agreement, they had numerous bargaining sessions, and over 10-1/2 months elapsed between the date on which Local 9408 won the arbitrator conducted election and the date on which the petition was filed. However, many of the pertinent facts in this case differ from those in *MGM*. Here the bargaining unit was about 5% of the size of the bargaining unit in *MGM*. The parties in this case relied heavily on a template agreement, previously agreed to by CWA and the Employer's parent corporation, to form the basis for language in the majority of the contract's articles. Therefore, for the most part the parties were not addressing new or novel contract issues. In addition, the parties in this case were not trying to adopt a model for other facilities and did not establish and/or use a unique, complex bargaining process. As of the date on which the petition was filed, the parties had reached agreement on most issues, but they still had not reached agreement on three significant

[6] In *Lee Lumber, supra,* the Board specifically found a reasonable time for bargaining to be no less than 6 months but no more than 1 year. So far, the Board has not specifically applied this rule to cases involving voluntary recognition. However, it is clear from *MGM* and other cases that the Board will find periods of 10 to 12 months to be reasonable time for bargaining only in situations involving highly unusual circumstances. See also *Livent Realty, a Division of Livent U.S., Incorporated, d/b/a the Ford Center for the Performing Arts,* 328 NLRB No. 1 (1999).

economic issues. Moreover, on that same day, the CWA had rejected the Employer's final offer. When overall agreement was reached the next day, it was not reached by the parties at the bargaining table; rather, it was reached as part of a nationwide settlement of various disputes between the Employer's parent company and CWA.

I conclude that the factors weigh in favor of finding that a reasonable time for bargaining had elapsed as of the filing of the petition, and no recognition bar exists to block the processing of the decertification petition. While the amount of time at issue here is similar to that in the *MGM* case, the Board specifically stated in *MGM* that it was willing to extend the recognition bar only because of the unique circumstances in that case. As noted above, the facts in this case are easily distinguishable from those in *MGM*, and therefore, it would not be appropriate to extend the recognition bar in this case, and the purposes of the Act will best be served by processing the instant petition.

Accordingly, I shall direct an election among the following employees:

> All full time and regular part-time technicians, installers, converter control employees, and dispatchers employed by the Employer at its Fresno and Visalia, California facilities; but excluding office clerical employees, guards, and supervisors as defined in the Act.

There are approximately 150 employees in the petitioned-for unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.[7] Eligible to vote are those in the voting group who are employed during

[7] Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military service of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for purposes of collective bargaining by COMMUNICATIONS WORKERS OF AMERICA, LOCAL 9408.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before November 26, 2002. No extension of time to file this list shall be

granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by December 3, 2002.

Dated at Oakland California this 19th day of November 2002.

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Alan B. Reichard,
Regional Director
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